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Mustapha bin Mohamed (as the receiver and manager of Sykt Ji Seng Hong Plastic Manufacturing Sdn Bhd) v Ji Seng Hong Plastic Manufacturing Sdn Bhd (Ng Bak Soon & Ors, petitioners)

HIGH COURT (IPOH) — COMPANY WINDING UP PETITION NO 28–46 OF 2005
CHE MOHD RUZIMA JC
19 MAY 2014

Civil Procedure — Intervention — Application for — Validation order — Whether application to intervene was for winding up order — Application for validation order under s 223 of the Companies Act 1965 — Whether applicant could use existing files to apply for validation order for disposition of assets — Whether proper to apply for leave to intervene in existing winding up proceeding — Whether applicant had all right to apply for validation order

The petitioners had filed a petition to wound up the respondent on the basis that the directors of the respondent, have acted in the affairs of the company in their own interest rather than the interest of the members as a whole, or in any other manner whatsoever which appeared to be unfair or unjust to the other members pursuant to s 218(1)(f) of the Companies Act 1965 ('Act'). One of the main issues in the winding up petition concerned the creation of 1.3 million overstated stocks in the respondent company. The winding up judge made a finding that the director in the respondent who was responsible for the creation of the RM1.3m overstated stocks was Lee Chin Yen, a non-executive director of the respondent who was also the first petitioner's brother in law. Prior to the winding up order, Hong Leong Bank Bhd ('HLBB') had on two occasions granted financing facility to the respondent and as security for the same, the respondent had granted in favour of HLBB two debentures ('the first debenture' and 'the second debenture'). The debentures covered all fixed and floating assets and undertakings both present and future of the respondent, and also contain an irrevocable power of attorney ('POA') clause pursuant to which the respondent had for valuable consideration appointed HLBB and/or its R&M to be the attorney of the respondent. The POA clauses were in section 13.01 in the first debenture and section 11.01 in the second debenture. The respondent had defaulted in its obligations to repay HLBB and HLBB had pursuant to the debentures appointed the applicant vide a deed of appointment. By virtue of the POA clause, the applicant's appointment as receiver and manager ('R&M') for the respondent also entails his appointment as the lawful attorney for the respondent for valuable consideration. The petitioners had submitted that it was too late for the applicant to intervene.

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The applicant's application for leave to intervene in the winding up proceedings for validation orders for the sale of the respondent's assets and for assignment of its trademarks pursuant to s 223 of the Act was filed after the winding up proceedings have been concluded with the winding up order being granted. This was the applicant's application for an order under s 223 of the Act for, inter alia, the following orders: that the applicant, R&M of the respondent be granted leave to intervene in this proceedings and be made a party; that the sale and purchase agreements ('SPA') and assignment agreement executed by the applicant as R&M and attorney of the respondent be declared valid; that all steps taken by the applicant and all documents executed by the applicant be declared valid; that the applicant be empowered to take such further steps and execute such other relevant documents where necessary for and on behalf of the respondent in disposing of the assets of the respondent pursuant to the terms of the said SPA and assignment agreement.

Held, allowing the application:

(1) The application by the applicant to intervene did not intent to interfere with the winding up order. This application had nothing to do with the winding up order. The main purpose of the application was to apply for the validation order under s 223 of the Act. Even though there were no longer any winding up proceedings, the applicant could still use the existing files to apply for the validation order for the disposition of the respondent's assets since it was related to winding up order given by this court. In order to apply for the validation order, it was proper for the applicant to apply for leave to intervene in the existing winding up proceeding and therefore the objection on the preliminary point of law raised by the petitioners didn't hold water (see paras 18–19).

(2) The applicant had all the right to apply to the court for the validation order to validate the sale of the respondent's assets and for the assignment of the trademarks regardless that there are stay granted for the winding up proceeding or not (see para 39).

(3) Even though the applicant as R&M lost his status as agent of the respondent when the respondent was wound up but he continued to retain his possessory powers as conferred upon him by the debenture to take custody and control of all the respondent's assets charged under the debenture. The clear demarcation of powers and duties between the applicant under the debenture and the liquidator under the law enabled the applicant exercising his separate powers to deal with respondent's assets. Therefore, the applicant's dealings in disposing the respondent's assets to the highest bidder for each and every asset offered through public tender was well within the scoop of applicant's powers and duties and validly done (see para 42).

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(4) The petitioners, while alleging and disputing the valuation report, had not discharged their burden of proof by producing another evidence of valuation to counter the value given by the applicant. Without the benefit of having another expert opinion, there was no option to evaluate the other opinion as to the value of those assets. There are various method of valuation and what was tendered in court by the applicant was one of it. It could not be said that that valuation was defective unless it could be shown that the method used was totally wrong and against the basic principles of valuation. The petitioners failed to do so. The opinion given by a valuer as regard to the valuation of the assets was merely a guide to the applicant and the valuation given didn't bind the applicant since the sale was put up in the open market (see paras 45–46).

(5) The applicant's failure to inform the liquidator as to the dealings was not fatal and could not nullify those dealings. The applicant, as matter of practise, could have informed the liquidator prior to the dealings but there was no legal requirement for the applicant to do so. The liquidator was not left without information, the offer for sale of the respondent's asset by public tender served a good notice to the public including the liquidator. Furthermore, the current application even though was not serve on the liquidator, was serve on the respondent where the liquidator was it's agent under the law (see para 51).

[Bahasa Malaysia summary

Pempetisyen-pempetisyen telah memfailkan untuk menggulung responden atas dasar bahawa pengarah-pengarah responden, telah bertindak dalam hal ehwal syarikat untuk kepentingan mereka sendiri dan bukan bagi kepentingan ahli-ahli keseluruhannya, atau dalam apa-apa cara yang lain yang jelas tidak adil kepada ahli-ahli lain berikutan kepada s 218(1)(f) Akta Syarikat 1965 ('Akta'). Salah satu isu utama dalam petisyen penggulungan adalah berkenaan pembentukkan 1.3 juta stok berlebihan dalam syarikat responden. Hakim penggulungan membuat dapatan bahawa pengarah dalam responden yang bertanggungjawab untuk pembentukan RM1.3m stok berlebihan adalah Lee Chin Yen, pengarah bukan eksekutif responden yang juga adalah ipar lelaki kepada pempetisyen pertama. Sebelum perintah penggulungan tersebut, Hong Leong Bank Bhd ('HLBB') telah dua kali memberikan kemudahan kewangan kepada responden dan sebagai jaminan untuknya, responden telah memberikan kepada HLBB dua debentur ('debentur pertama' dan 'debentur kedua'). Debentur-debentur tersebut meliputi kesemua aset tetap dan terapung dan berjanji untuk kedua-dua masa sekarang dan hadapan responden, dan juga mengandungi klausa surat kuasa wakil yang tidak boleh ditarik balik ('SKW') berikutan di mana responden mempunyai balasan bernilai melantik HLBB dan/atau R&M untuk menjadi peguam responden. Klausa-klausa SKW adalah dalam seksyen 13.01 dalam debentur pertama dan seksyen 11.01 dalam debentur kedua. Responden telah mengingkari dalam

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tanggunjawabnya untuk membayar balik HLBB dan HLBB telah berikutan kepada debentur-debentur tersebut melantik pemohon melalui surat perlantikan. Mengikut klausa SKW, perlantikan pemohon sebagai penerima dan pengurus ('PP') kepada responden juga melibatkan perlantikannya sebagai peguam sah untuk balasan bernilai. Pempetisyen-pempetisyen telah berhujah bahawa adalah terlalu lambat untuk pemohon mencelah. Permohonan pemohon untuk mencelah dalam prosiding penggulungan untuk perintah-perintah pengesahan untuk jualan aset responden dan untuk penyerahan hak terhadap cap dagangannya berikutan s 223 Akta difailkan selepas prosiding penggulungan ditamatkan dengan perintah penggulungan dibenarkan. Ini adalah permohonan pemohon untuk perintah di bawah s 223 Akta, antara lain, perintah-perintah berikut: bahawa pemohon penerima dan pengurus responden diberi kebenaran untuk mencelah dalam prosiding ini dan dibuat sebagai pihak; bahawa perjanjian jual beli ('PJB') dan perjanjian penyerahan hak yang dilaksanakan oleh pemohon sebagai PP dan peguam responden disiytiharkan sah; bahawa kesemua langkah yang diambil oleh pemohon dan kesemua dokumen yang dilaksanakan oleh pemohon diisytiharkan sah; bahawa pemohon diberi kuasa untuk mengambil langkah selanjutnya dan melaksanakan dokumen relevan yang lain di mana perlu untuk dan bagi pihak responden dalam menjual aset responden berikutan terma PJB dan perjanjian penyerahan hak tersebut.

Diputuskan, membenarkan permohonan:

(1) Permohonan oleh pemohon untuk mencelah tidak berniat untuk campur tangan dengan perintah penggulungan. Permohonan ini tidak mempunyai apa-apa kaitan dengan perintah penggulungan. Tujuan utama permohonan adalah untuk memohon untuk perintah pengesahan di bawah s 223 Akta. Walau tidak lagi terdapat apa-apa prosiding penggulungan, pemohon masih boleh menggunakan fail-fail yang ada untuk perintah pengesahan bagi jualan aset responden memandangkan ia berkaitan kepada perintah penggulungan yang diberi oleh mahkamah ini. Untuk memohon perintah pengesahan, adalah betul untuk pemohon memohon untuk kebenaran mencelah dalam prosiding penggulungan yang ada dan oleh itu bantahan ke atas poin permulaan undang-undang yang dibangkitkan oleh pempetisyen-pempetisyen tidak memberi kesan (lihat perenggan 18–19).

(2) Pemohon mempunyai hak untuk memohon kepada mahkamah untuk perintah pengesahan untuk mengesahkan jualan aset responden dan untuk penyerahan hak cap dagangan tanpa menghiraukan bahawa terdapat penangguhan yang diberikan untuk prosiding penggulungan atau tidak (lihat perenggan 39).

(3) Walaupun pemohon sebagai PP kehilangan statusnya sebagai ejen responden apabila responden digulung tetapi dia terus mengekalkan

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kuasa pemilikannya seperti yang diberikan kepadanya oleh debentur untuk mendapatkan kawalan dan jagaan terhadap kesemua aset responden yang dicaj di bawah debentur. Pembatasan kuasa dan tugas yang jelas di antara pemohon di bawah debentur dan likuidator di bawah undang-undang membolehkan pemohon melaksanakan kuasa berasingannya untuk menguruskan aset responden. Oleh itu, pengurusan pemohon dalam menjual aset responden kepada pembida yang tertinggi untuk masing-masing dan setiap aset yang ditawarkan melalui tender awam adalah dalam skop kuasa dan tugas pemohon dan dilakukan dengan sah (lihat perenggan 42).

(4) Pempetisyen-pempetisyen, sementara mendakwa dan mempertikaikan laporan penilaian, tidak melepaskan beban pembuktian mereka dengan mengemukakan keterangan penilaian untuk menentang nilai yang diberi oleh pemohon. Tanpa mempunyai manfaat pandangan pakar yang lain, tiada opsyen untuk menilai pandangan lain terhadap nilai aset tersebut. Terdapat pelbagai cara penilaian dan apa yang ditenderkan di mahkamah oleh pemohon adalah salah satu daripadanya. Ia tidak dapat dikatakan bahawa penilaian adalah cacat kecuali ia dapat ditunjukkan bahawa cara yang digunakan adalah salah dan berlawanan asas prinsip penilaian. Pempetisyen-pempetisyen gagal berbuat sedemikian. Pandangan yang diberikan oleh penilai berkaitan penilaian aset hanya panduan kepada pemohon dan penilaian yang diberikan tidak mengikat pemohon memandangkan jualan diletakkan di pasaran terbuka (lihat perenggan 45 & 46).

(5) Kegagalan pemohon untuk memberitahu likuidator terhadap pengurusan bukan serius dan tidak dapat membatalkan pengurusan tersebut. Pemohon, sebagai amalan, boleh memberitahu likuidator sebelum pengurusan tetapi tidak terdapat kehendak dari segi undang-undang untuk pemohon berbuat sedemikian. Likuidator bukan tanpa maklumat, tawaran jualan aset responden melalui tender awam menjadi notis kepada orang awam termasuk likuidator. Selanjutnya, permohonan ini walaupun tidak diserahkan ke atas likuidator, diserahkan kepada responden di mana likuidator adalah ejen di bawah undang-undang (lihat perenggan 51).]

Notes

For cases on application for intervention, see 2(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 4521–4533.

Cases referred to

Australian and New Zealand Banking Group Ltd v Bangadilly Pastoral Co Pty Ltd and Others (1978) 19 ALR 519, HC (refd)

Farrar v Farrars Ltd (1888) 40 Ch D 395, CA (refd)

Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn

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Sdn Bhd and other appeals [2008] 2 MLJ 622, FC (refd)
K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBF Finance Bhd & Anor [2005] 2 MLJ 201, FC (refd)
Malayan Banking Bhd v Lim Poh Ho & Anor [1997] 1 MLJ 662, CA (refd)
Ngan & Ngan Holdings & Anor v Central Mercantile Corp (M) Sdn Bhd [2010] 1 MLJ 822, CA (refd)
Salomon v Salomon & Co Ltd; Salomon & Co, Ltd v Salomon [1895–99] All ER Rep 33, HL (refd)
Sama Corp Sdn Bhd; CI Holdings Bhd, Re v Jabatan Pemegang Harta [1992] 2 MLJ 251, HC (refd)
The Ayer Molek Rubber Company Bhd v Bintang-Bintang Sdn Bhd [2013] 4 CLJ 820, CA (refd)
Tse Kwong Lam v Wong Chit Sen [1983] 1 WLR 1349, PC (refd)
Wong Wee Kheong & Anor v Daya Bersama Sdn Bhd [2013] 3 MLJ 313; [2013] 3 CLJ 969, FC (folld)

Legislation referred to

Companies Act 1965 ss 218(1)(i), (1)(f), 219(2), 223

Sakthy Vell a/l Saminathan (Wan Koon Meng with him)(Azman Davidson & Co) for the appellants.
Sivagurunathan (WY Chan & Roy) for the respondent.

Che Mohd Ruzima JC:

INTRODUCTION

[1] This is the applicant's application dated 3 December 2013 for an order under s 223 of the Companies Act 1965 for, inter alia, the following orders:

(a) that the applicant herein as receiver and manager ('R&M') of the respondent be granted leave to intervene in this proceedings and be made a party hereto;

(b) that the following sale and purchase agreements ('SPA') and assignment agreement executed by the applicant as R&M and lawful attorney of the respondent for valuable consideration for the sale of the following assets of the respondent be declared valid:

(i) SPA dated 25 October 2013 with CAM Plastic Industry Sdn Bhd in respect of an industrial lot with a factory and structures erected thereon and having an address at Lot No 19971 Kanthan Industrial Estate, Kanthan, 31200 Chemor, Perak Darul Ridzuan ('the industrial lot') for RM3,467,000;

(ii) SPA dated 2 October 2013 with Heng Mimi and Teh Seng Poh in respect of a terrace house known as No 86 Jalan Naga Kanthan 4,

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Taman Sri Kanthan, 31200 Chemor, Perak Darul Ridzuan ('the terrace house') for RM70,000;

(iii) SPA dated 30 August 2013 with Puan Khor Yew Huan in respect of an apartment known as Parcel E8, Level 4 Eugenia Block, Greenhill Resort, 39000 Tanah Rata Cameron Highlands, Pahang Darul Makmur ('the apartment') for RM180,000;

(iv) SPA dated 25 October 2013 with CAM Plastic Industry Sdn Bhd in respect of various machinery and fixtures and fittings of the respondent ('the Machinery, Fixtures and Fittings') for RM764,000; and

(v) assignment agreement dated 25 October 2013 with CAM Plastic Industry Sdn Bhd in respect of four trademarks of the respondent, ('the trademarks') for RM45,000,

(c) that all steps taken by the applicant and all documents executed by the applicant for and on behalf of the respondent prior to the date of the order to be granted herein in respect of the disposal of the assets of the respondent pursuant to the terms of the said SPA and assignment agreement be declared valid; and

(d) that the applicant be empowered to take such further steps and execute such other relevant documents where necessaryfor and on behalf of the respondent in disposing of the assets of the respondent pursuant to the terms of the said SPA and assignment agreement.

[2] On 10 April 2014, the court allowed the applicant's application to intervene and allowed the validation orders. The grounds of the decisions are as follows.

BRIEF BACKGROUND FACTS

[3] The petitioners had filed a petition dated 24 August 2005 to wound up the respondent. Essentially the winding up petition was filed on the following basis:

(a) that the directors of the respondent, have acted in the affairs of the company in their own interest rather than the interest of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to the other members pursuant to s 218(1)(f) of the Companies Act 1965; and

(b) that the court is of the opinion that it is just and equitable that the company be wound up pursuant to s 218(1)(i) of the Companies Act 1965.

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[4] One of the main issues in the winding up petition concern the creation of 1.3m over stated stocks in the respondent company sometimes in or around the year 1995 without the knowledge of the petitioners. A

[5] The winding up judge made a finding that the director in the respondent who was responsible for the creation of the RM1.3m over stated stocks was Lee Chin Yen, a non-executive director of the respondent who is also the first petitioner's brother in law. Lee Chin Yen gave instructions to Chang Ah Seng, an executive director of the respondent to create the over stated stocks. B

[6] On 18 October 2012, the court granted the winding up order of the respondent on just and equitable ground and the official receiver was appointed as a liquidator. C

[7] On 19 October 2012, the respondent filed a notice of appeal against the winding up order and a notice of motion for a stay of the winding up order pending the hearing and determination of its appeal to the Court of Appeal against the said order. On 29 October 2012, the respondent obtained an interim stay of the winding up order pending the hearing and disposal of the respondent's notice of motion. D E

[8] On 5 November 2012, the petitioners filed a notice of motion for the appointment of Mr Ong Tee Chew as the private liquidator for the respondent. On 21 February 2013, the court allowed the petitioners' application to appoint a private liquidator and dismissed the respondent's notice of motion for a stay of the winding up order. F

[9] The respondent being dissatisfied with the said order, filed a notice of motion at Court of Appeal for a stay of the execution of the winding up order on 12 March 2013. On 3 April 2013 the Court of Appeal allowed the respondent's notice of motion for a stay of execution of the winding up order pending the disposal of the appeal against the winding up order dated 18 October 2012, which is currently pending. G

[10] Besides that, the fact that prior to the winding up order, Oriental Bank Bhd and now known as Hong Leong Bank Bhd ('HLBB') had on two occasions granted financing facility to the respondent and as security for the same, the respondent had granted in favour of HLBB a debenture dated 2 October 1995 ('the first debenture') and another debenture dated 12 March 1998 ('the second debenture') was not disputed. H I

[11] The debentures cover all fixed and floating assets and undertakings both present and future of the respondent, and also contain an irrevocable power of attorney clause pursuant to which the respondent has for valuable

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consideration appointed HLBB and/or its R&M to be the attorney of the respondent. The power of attorney clauses are in section 13.01 in the first debenture and section 11.01 in the second debenture. These debentures were duly registered in the High Court.

[12] The respondent had defaulted in its obligations to repay HLBB and HLBB had pursuant to the debentures appointed the applicant vide a deed of appointment dated 19 February 2013.

[13] By virtue of the power of attorney clause, the applicant's appointment as R&M for the respondent also entails his appointment as the lawful attorney for the respondent for valuable consideration.

THE APPLICATION

Preliminary point of law

[14] The petitioners had submitted that it was too late for the applicant to intervene. The applicant's application for leave to intervene in the winding up proceedings for validation orders for the sale of the respondent's assets and for assignment of its trademarks pursuant to s 223 of the Companies Act was filed after the winding up proceedings have been concluded with the winding up order being granted on 18 October 2012. Therefore there are no longer any winding up proceedings before this court in existence for the applicant to intervene (the Federal Court case of *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622 was referred).

[15] The applicant reply by saying that the said grounds of objection is flawed both in fact and in law. Despite the winding up order was granted on 18 October 2012, the winding up has however been stayed pursuant to the order of the Court of Appeal dated 3 April 2013 with the effect that the status quo of the respondent being preserved. This was expressly admitted by the petitioners. The petitioners' own admission clearly contradict and defeat the petitioners' grounds for preliminary objection.

[16] It was also submitted that in any event, whether or not the respondent has been wound up is irrelevant as the winding up proceeding had commenced against the respondent since the year of 2005. The application made was for the validation order made pursuant to s 223 of the Companies Act 1965 which requires the disposition of the respondent's assets after winding up has commenced to be validated by the court.

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[17] It was further submitted that even if the stay order is lifted and the respondent has been wound up, it will not affect the locus of the applicant as R&M to sell the respondent's assets (the Federal Court case of *K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBF Finance Bhd & Anor* [2005] 2 MLJ 201 was referred).

[18] As regard to the preliminary point of law raised by the petitioners, I am of the opinion that the application by the applicant to intervene does not intent to interfere with the winding up order. This application has nothing to do with the winding up order. The main purpose of the application is to apply for the validation order under s 223 of the Companies Act. Even though there are no longer any winding up proceedings before this court, it is my view that the applicant can still use the existing files to apply for the validation order for the disposition of the respondent's assets since it was related to winding up order given by this court.

[19] In the premise, in order to apply for the validation order, I find that it is proper for the applicant to apply for leave to intervene in the existing winding up proceeding and therefore the objection on the preliminary point of law raised by the petitioners doesn't hold water and I dismiss it.

THE VALIDATION ORDER

[20] The petitioners had objected to the application of the validation order by the applicant on the following grounds:

(a) the applicant has knowledge regarding the winding up proceedings;

(b) the bulk of the assets or properties are being sold to a company with common directors of the respondent; and

(c) the transaction in the present case is not a truly independent bargain and does not reflect the true market value of the respondent's assets.

[21] The petitioners had submitted that the sale and purchase agreements signed between the applicant and various purchasers in August and October 2013 which is well after the applicant became aware that the respondent has been wound up. Yet the applicant had failed to inform Mr Ong Tee Chew, the liquidator of the respondent regarding the sale of the respondent's assets. Since Mr Ong is a court appointed liquidator, he is also an officer of the court who must be kept informed.

[22] The applicant also failed to inform the petitioners regarding the proposed sale of the respondent's assets although the petitioners are the shareholders or contributories of the respondent company who would be affected by the said sale and may be liable to contribute to the debts owed by the

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respondent if the proceeds of sale by the applicant are insufficient to cover the debts owed under the debentures.

[23] The petitioners also submitted that the bulk of the assets or properties under the debentures are now being sold by the applicant to companies with common directors of the respondent. An industrial lot together with a factory and structures erected on it, various machineries, fixtures and fittings located at the factory and four trademarks of the respondent had being sold to Lee Chin Yen and Tan Hong Cheng who are the directors and shareholders of the respondent and are also the directors and shareholders of the companies called CAM Plastic Industry Sdn Bhd.

[24] CAM Plastic Industry Sdn Bhd is wholly owned by CAM Resources Bhd, a public listed company with Lee Chin Yen and Tan Hong Cheng being the directors and shareholders through their nominee companies. Therefore it is submitted that if validation orders are granted for the sale and purchase agreements entered between the applicant with CAM Plastic Industry Sdn Bhd, the ultimate effect would be that the business of the respondent is effectively transferred to Lee Chin Yen and Tan Hong Cheng who are the directors and shareholders of CAM Plastic Industry Sdn Bhd which is wholly owned by CAM Resources Bhd. Leaving behind an empty shell in the respondent and this will defeat the purpose of the winding up order and the appointment of Mr Ong Tee Chew as the private liquidator of the respondent. As the private liquidator, Mr Ong has a duty to investigate the affairs of the respondent regarding the creation of the RM1.3m over stated stocks by Lee Chin Yen and Chang Ah Seng to avoid paying income tax and to ensure that the directors are held accountable for their conduct.

[25] It is further submitted that the validation orders being sought in the present case is a back door way to defeat the winding up order by transferring the assets, business and trademarks of the respondent to another company controlled by Lee Chin Yen and Tan Hong Cheng. It is not just and fair to allow the sale and purchase agreements in the present case to be validated since it is not bona fide and was done under suspicious circumstances (the Federal Court case of *Wong Wee Kheong & Anor v Daya Bersama Sdn Bhd & Other Appeals* [2013] 3 MLJ 313; [2013] 3 CLJ 969 was referred).

[26] As regard to the transaction which is said not to be a truly independent bargain and does not reflect the true market value of the respondent's assets, the petitioner submitted that any transaction entered by the applicant to sell the assets or properties of the respondent must be a truly independent bargain. It had to be noted that the applicant did not deny that bulk of the sales are to companies with common directors of the respondent(the cases of *Farrar v Farrars Ltd* (1888) 40 Ch D 395; *Australian and New Zealand Banking Group*

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Ltd v Bangadilly Pastoral Co Pty Ltd and Others (1978) 19 ALR 519; and *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349 were referred). A

[27] As to the true market value, the petitioners submit that the applicant had not disclosed the number of offers he had received after the advertisement in the newspapers. The petitioners further submitted that the valuation report prepared by Jordan Lee & Jaafar dated 27 February 2013 with regards the industrial lot was defective on the reason that the said report did not show any evidence of the values of comparative properties ie industrial land with factory and structures erected thereon. B C

[28] Finally the petitioners had submitted that the applicant has a duty to take reasonable care to obtain the true market value of the assets at the time of the sale although he is not obliged to sell the assets at the highest price and has a duty to make full and frank disclosure, (the case of *Re Sama Corp Sdn Bhd; CI Holdings Bhd v Jabatan Pemegang Harta* [1992] 2 MLJ 251 was referred). D

[29] In contrast, the applicant had submitted that since the crux of the petitioners' challenge to the sale of the respondent's assets was essentially that the sale by the applicant is questionable and not bona fide, the petitioners are entitled under the relevant provisions of the Companies Act to seek recourse against the applicant upon completion of the sale, and the petitioners' current action in opposing the application herein is premature and should not be entertained. E F

[30] In the event that the petitioners are allowed to challenge the sale by the applicant, the applicant had submitted that the sale of the respondent's assets by the applicant was bona fide and sold at open market value base on measures taken by the applicant before the sale. G

[31] After the applicant had taken over the affairs of the respondent to manage and realise its assets for HLBB as a secured creditor, the applicant proceeded with the necessary steps to sell the above assets by way of advertisement of 'Offer for Sale' via public tender which involved obtaining of a valuation report, preparing of information memorandum, and placing of an 'Offer for Sale' advertisement in the *Star* newspaper inviting the general public to make offer to purchase. H

[32] As for the valuation reports and the respective market value and force sale value as ascribed for the assets, it is submitted that the petitioners while alleging and disputing the valuation report, have not discharged their burden of proof thereof by producing another evidence of valuation report to counter the value given by the applicant and as such, their allegation of defective valuation should be disregarded in total. I

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[33] The applicant also alleged that the petitioners had made a bare assertion when picking up issues on the valuation. It is submitted that the valuation given is merely a guide to the applicant and the valuation doesn't bind the applicant since the sale was put up in the open market, (the Court of Appeal's case of *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662 was reffered).

[34] The applicant had received offers to purchase the respondent's assets after the newspaper advertisements. The applicant had then proceeded to accept the highest offer. The petitioners had made unfounded allegation that the number of offers received was not disclosed, and that the sales of the respondent's assets do not reflect the true market value. The applicant has not only taken all reasonable care to obtain the true market value of the respondent's assets at the time of the sale, but have conducted himself professionally throughout the sale of the respondent's assets with strict adherence to the due process and in customary practice followed in such 'offer for sale' exercise.

[35] As regards to the respondent's assets namely the industrial lot, the machineries, fixtures and fittings, and the trademarks purportedly sold to CAM Plastic Industry Sdn Bhd which happens to have common shareholders with the respondent, it is submitted that the objection should be disregarded in total based on the doctrine of separate entities (the cases of *Salomon v Salomon & Co Ltd; Salomon & Co, Ltd v Salomon* [1895–99] All ER Rep 33 and *Ngan & Ngan Holdings & Anor v Central Mercantile Corp (M) Sdn Bhd* [2010] 1 MLJ 822 were referred).

DECISION

[36] The applicant's application for the validation order was made under s 223 of the Companies Act 1965. For easy reference the provision of that section is as follows:

> Section 223 Avoidance of dispositions of property, etc.
>
> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

[37] As to the meaning of 'commencement of winding up', sub-s 219(2) of the Companies Act 1965 provides that the winding up shall be deemed to have commenced at the time of the presentation of the petition for the winding up. The provisions of that section are as follows:

> Section 219 Commencement of winding up by the Court.

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(1) Where before the presentation of the petition a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and, unless the Court on proof of fraud or mistake thinks fit otherwise to direct, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

(2) In any other case the winding up shall be deemed to have commenced at the time of the presentation of the petition for the winding up.

[38] Besides that, the Court of Appeal in the case of *The Ayer Molek Rubber Company Bhd v Bintang-Bintang Sdn Bhd* [2013] 4 CLJ 820 where Hamid Sultan JCA delivering the judgment of the court held at paras 3–4 p 825 as follow:

[3] One of the crucial section to determine in this appeal is s 223 of the Companies Act 1965 ('the CA 1965') and the scope of s 243 of the CA 1965. The said sections read as follows:

Section 223: Avoidance of dispositions of property, etc.

Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

Section 243: Power to stay winding up.

(1) At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

[4] *At the outset we must say that s 243 of the CA 1965 itself does not prohibit the court while granting the stay to make any relevant orders which may be necessary and essential under s 223 of the CA 1965*. And no authorities from respected jurisdiction were furnished to say otherwise. In addition on the factual matrix of the case s 223 will not apply. (Emphasis added.)

[39] Base on the provision and the authority cited above, I have no doubt that the applicant has all the right to apply to the court for the validation order to validate the sale of the respondent's assets and for the assignment of the trademarks regardless that there are stay granted for the winding up proceeding or not.

[40] Meanwhile, in deciding whether a validation order should be granted under s 223 of the Companies Act 1965, I was reminded that there are two broad considerations to be considered as decided in the case of *Wong Wee Kheong & Anor v Daya Bersama Sdn Bhd* [2013] 3 MLJ 313; [2013] 3 CLJ

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969 where the Right Honourable CJ (Malaya) Zulkefli Makinudin speaking for the Federal Court at p 324 (MLJ); pp 981–982 (CLJ) had said that:

> [12] With respect we could not agree with the above contention of the respondent. It is true that ordinarily since the respondent company had been wound up on 24 August 2000, a disposition of the company's property after the commencement of the winding up, which was on 31 May 2000 (filing of the petition) would be void. *However based on the peculiar set of facts of the case, it is our considered view that the proviso in s 223 of the Act is still operative in relation to the transactions which took place and the court has the power and jurisdiction to declare the transactions as valid.*
>
> [13] *It is to be noted that s 223 of the Act makes no mention as to time. It is our view validation can be made by the court at any time.* We are in agreement with the submission of learned counsel for the appellants that to insist that the purchasers must have applied for a validation after the company was wound up, there must be knowledge. Here the purchasers had no knowledge at all of the winding up order at the material time. It is also noted that the Act does not prescribe as to how the discretion under s 223 of the Act is to be exercised. However there are case laws that have distilled the principles involved in validating transactions after the commencement of winding up, and even after a winding order has been granted based on two broad considerations:
>
> (i) if the transaction(s) is/are beneficial to the general body of creditors; or
>
> (ii) if it was just and fair to allow the transaction(s) with particular regard to the good and honest intention of the persons concerned. (Emphasis added.)

[41] Having guided by the two broad considerations in mind, now I will consider the merits of the application. The applicant as R&M appointed by the debenture holder has all the authorities to deal with the respondent's asset. Besides that, the applicant is also the holder of an irrevocable power of attorney granted by the respondent for valuable consideration and the said power of attorney survive and remain valid even though the respondent had been wound up. The Federal Court in the case of *K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBF Finance Bhd & Anor* [2005] 2 MLJ 201, Siti Norma Yaakob FCJ at para 54 p 225 had summarised the powers and duties of R&M and liquidator as follows:

> [54] Following my interpretation of the relevant laws and their application to the cases cited, I answer the six questions posed to us in the following manner.
>
> (1) ...
>
> (i) Upon the winding up of a company and the appointment of a liquidator, the receiver and manager ceases to be the agent of the company but he continues to retain his possessory rights conferred upon him by the debenture to take custody and control of all the assets charged under the debenture.

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> (ii) Section 233 and/or s 277 of the Act, read together with ss 300 and 305 of the same Act and r 66 of the Rules do not apply to a receiver and manager appointed pursuant to a power contained in a debenture and the receiver and manager is entitled to possession and control of the charged assets despite a demand made by the liquidator for their return, unless those assets are redeemed by the liquidator or there is a surplus of proceeds which has to be returned to the liquidator.
>
> (iii) Following a winding up, the receiver and manager loses his status as agent of the company. He continues to retain his possessory powers as a receiver and manager whilst the liquidator exercises his statutory powers and duties under the Act. There is no question of any superior ranking. They exist side by side with each exercising his separate powers and duties conferred on them by the Act in the case of the liquidator and by the debenture in the case of the receiver and manager. ...

As regard to the power of attorney, the Federal Court in para 4 at the same page further observe that:

> 4 A winding up order does not cancel a power of attorney nor does s 4 read together with ss 300 and 305 and the other provisions of the Act. Thus my answers to questions 1–3 would not be different if the debenture which provides for the appointment of a receiver and manager incorporates a power of attorney as well.

[42] It is clear that even though the applicant as R&M loses his status as agent of the respondent when the respondent was wound up but he continues to retain his possessory powers asconferred upon him by the debenture to take custody and control of all the respondent's assets charged under the debenture. The clear demarcation of powers and duties between the applicant under the debenture and the liquidator under the law enable the applicant exercising his separate powers to deal with the respondent's assets. Therefore, it is my considered view that the applicant's dealings in disposing the respondent's assets to the highest bidder for each and every asset offered through public tender is well within the scoop of the applicant's powers and duties and validly done.

[43] As to the mode of dealings with the respondent's assets, the applicant affirmed that the necessary steps to sell the assets by way of advertisement of 'Offer for Sale' via public tender. The steps include the effort of getting the valuation report, preparing of information memorandum, and placing of an 'Offer for Sale' advertisement in the *Star* newspaper on 11 March 2013, 8, 12 and 19 April 2013 to invite the general public to make offer to purchase the assets. The applicant then proceeded to accept the highest bidder offer of various assets and finalise the dealing with purchasers of the assets by signing a sale and purchase agreement subject to the condition precedent that the sales

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thereof to be validated by way of validation order being obtained by the applicant from the court.

[44] I am of the opinion that with all step taken by the applicant shows that the applicant has acted in good faith and had done what supposed to be done by a prudent R&M while dealing with the charged assets.

[45] As regard to the petitioners' submission on the market value and their objection on the method of valuation done by the valuer on the industrial lot, I agree with the applicant's counsel that the petitioners while alleging and disputing the valuation report, have not discharged their burden of proof thereof by producing another evidence of valuation to counter the value given by the applicant. Without the benefit of having another expert opinion, I don't have the option to evaluate the other opinion as to the value of those assets. There are various method of valuation and what was tendered in court by the applicant is one of it. I cannot say that that valuation is defective unless it can be shown that the method use is totally wrong and against the basic principles of valuation. The petitioners failed to do so.

[46] I also agree that the opinion given by a valuer as regard to the valuation of the assets is merely a guide to the applicant and the valuation given doesn't bind the applicant since the sale was put up in the open market.The Court of Appeal's in the case of *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662 where Mahadev Shanker JCA at p 670 had said that:

> The true commercial value of a property is not what any valuer thinks it should be, but the actual price that property will fetch when it is put up for sale in the open market. ...
>
> ... Any finding to the contrary required positive evidence from the borrowers that the auction was fraudulently or so recklessly or negligently conducted that there were genuine buyers who would have come and bid to buy the property ...

At p 675 the court further observes that:

> As for proof of damage, it can never be enough for the mortgagor to make a bare assertion that the price was too low even if he calls a valuer to say so because the 'true market value' or the 'best price' of a property is not what the mortgagor or his valuer thinks it is, because this is evidence of opinion not fact. The highest price a real buyer was willing to pay in the circumstances has to be judicially determined on the basis of relevant evidence ...

[47] Now, I came to the main objection of the petitioners. Some of the respondent's assets namely the industrial lot, the machineries, fixtures and fittings, and the trademarks was purportedly sold to CAM Plastic Industry Sdn Bhd which happens to have common shareholders with the respondent. CAM

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Plastic Industries Sdn Bhd is a wholly owned subsidiary of CAM Resources Bhd which is a public listed company. The petitioners alleged that the applicant dealing with the company controlled by Lee Chin Yen and Tan Hong Cheng is a back door dealing, not bona fide and was done under suspicious circumstances.

[48] On this issue I would like to look back to the role played by the applicant. I will not repeat myself, my observation and finding in paras [42]–[44] are also applicable here. Applicant is merely exercising his power and discharging his duty under the debenture and did not have any personal interest at all in the dealings. The method employed by the applicant for the sale of the assets by public tender defeats the petitioners' said contention. It was never alleged nor proven that there had been any private dealing between the applicant and CAM Plastic Industries Sdn Bhd or any of its directors.

[49] On this issue, it is also pertinent to note that the sale of the respondent's assets was done by the applicant, who is a R&M and not by the directors of the respondent. It is not a case where the seller company is represented by the director who is also the director of the purchasing company. Therefore the element of conflict of interest, improper bargain or bad faith alleged had never arise. Those dealings done by the applicant are in my view a truly independent bargain and all the case law referred to by the petitioners on this issue are easily distinguish.

[50] Finally, I would like to deal with the issue raise by the petitioners on the failure of the applicant to give any prior notice to Mr Ong Tee Chew, a court appointed liquidator for the respondent and the petitioners while acting as an agent of the debenture holder in entering into all the sale and purchase agreements to sell off the respondent's assets. The applicant argued that it is inconceivable for Mr Ong Tee Chew to be put in a position whereby he has to report in the future to the winding up court, the creditors and the contributories of the respondent that all the assets and trademark of the respondent has been sold off without his knowledge because the applicant failed to inform him.

[51] With respect, I am of opinion that the applicant's failure to inform the liquidator as to the dealings is not fatal and cannot nullify those dealings I agree that the applicant, as matter of practise could have inform the liquidator prior to the dealings but I cannot find any legal requirement for the applicant to do so. The liquidator was not left without information, the offer for sale of the respondent's asset by public tender serve a good notice to the public including the liquidator. Furthermore, the current application even though was not serve on the liquidator, was serve on the respondent where the liquidator is it's an agent under the law.

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A CONCLUSION

[52] Having the two broad principles in mind, I would also like to refer to the conclusion note in the applicant's submission as to continuous accumulation of interest and default interest. The amount of those interest are averaging more than RM400 per month (as confirmed by the applicant in para 15.3 of the applicant's affidavit in reply), and it is argued that it is therefore prudent and imperative that the sale be concluded soonest possible. I agree and I am of opinion that any attempts to delay the validation order to validate the dealings of the respondent's assets will not only denied the benefit to the general body of creditors but also cause the interest to accumulate and be detrimental to the respondent.

[53] In *Wong Wee Kheong*'s case it was held at paras 14–15 at p 324 (MLJ); p 982 (CLJ) as follows:

> [14] The general rule in s 223 of the Act is that it does not shut out bona fide transactions. In *Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449, Seah SCJ made reference to a passage by Vaisey J in *Re Steane's (Bournemouth) Ltd* which states:
>
> > that each case must be dealt with on its own facts and particular circumstances (special regard being had to the question of the good faith and honest intention of the persons concerned), and that the court is free to act according to the judge's opinion of what would be just and fair in each case.
> >
> > The discretion is an unfettered one.
>
> [15] In *Engtex Marketing Sdn Bhd v Zinma Housing Development Sdn Bhd & Anor* [2009] 5 CLJ 759, the issue of whether disposition of the company's property after winding up without sanction of court arose. The court held that although s 223 of the Act would invalidate such transfers, with regard to the bona fide purchaser, the provision would not apply when there is no allegation of misrepresentation or fraud or collusion against the purchaser or that the purchaser acted in concert with the persons in the company to effect the disposition despite being aware that that person had no authority to do so.

[54] Guided by the principles as laid down by the Federal Court above and for the reasons as adumbrated above, I allow the applicant's application for leave to intervene under prayer 1, validation order for the sale and purchase agreements and assignment agreement executed by the applicant with the purchasers under prayer 2 and the consequential order under prayer 3 and 4 of encl 55 with no order as to costs.

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Application allowed.

Reported by Afiq Mohamad Noor